86 1894

Supreme Court, U.S.
FILED
APR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

FRANK J.BROWN
Petitioner,

v.

ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Frank J. Brown, pro-se
P. O. Box 222
Fort Payne, Alabama
35967
(205) 845-5428

39 pp

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. May a plaintiff receive the Seventh Amendment right to a jury trial upon the discovery of fraud of plaintiff's counsel?.....

II. Where personal problems of counsel caused him grossly to neglect a diligent plaintiff's case and to mislead plaintiff, is handicapped plaintiff eligible to have their civil rights discrimination case reinstated?.....

III. Does a District Court lack jurisdiction to automatically appoint counsel for unrepresented in forma pauperis plaintiffs in job civil rights cases to provide more constitutional protection?

IV. Can a dismissal for want of prosecution be set aside because of gross and inexcusable neglect of plaintiff counsel when plaintiff was suffering from anxiety and illness?.....

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

OPINIONS BELOW 1

LIST OF PARTIES 2

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 2

CONSTITUTIONAL PROVISIONS,

STATUTES AND RULES INVOLVED iv

STATEMENT OF THE CASE 5

ARGUMENT 13

CONCLUSION 21

CERTIFICATE OF SERVICE 22

APPENDIX

JUDGEMENT. ELEVENTH CIRCUIT..... A1

PETITION FOR REHEARING. DENIED.... A3

ORDER OF DISMISSAL

(August 12. 1983)..... A5

ORDER OF DISMISSAL

(February 12. 1986)..... A9

TABLE OF AUTHORITIES

Cases

King v. Mordowanec. 46 F.R.D. 474 (U.S. Dist. Ct. D. Rhode Island 1969)..... 17

McKinney v. Boyle. 404 F.2d 632 (9th Cir. 1969)..... 15

Steuart v. Mattnews. 329 F.2d 234 (1964)..... 17

Transport Pool Div. Container Leasing. Inc. v. Joe Jones Trucking Co.. 319 F. Supp. 1308 (D.C.Ga. 1970)..... 20

CONSTITUTIONAL PROVISIONS

Constitution of the United States.
Amendment V..... 3
Constitution of the United States.
Amendment VII..... 3

STATUTES

28 United States Code § 1254(1). 2

RULES

Federal Rules of Civil Procedure.
Rule 59..... 3
Federal Rules of Civil Procedure.
Rule 60(b)..... 4
Federal Rules of Civil Procedure.
Rule 60(b)(6)..... 5

No.

In the SUPREME COURT of the UNITED STATES OCTOBER TERM, 1987

FRANK J. BROWN,

PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES: Judgement of the United States Court of Appeals for the Eleventh Circuit entered on December 31, 1986, affirming the dismissals of the United States District Court for the Northern District of Alabama.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the dismissals of the Northern District, copy of this decision and decision denying the Petitioner's petition for rehearing appear in the Appendix.

The Petitioner, Frank J. Brown respectfully prays that a writ of certiorari issue to review judgement of the United States Court of Appeals for the Eleventh Circuit entered on December 31, 1986.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion and entered its judgement on December 31, 1986. The Petitioner filed a timely petition for rehearing in the Eleventh Circuit which was denied on January 30, 1987. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1), which said statutory provision is believed to confer jurisdiction on this Court.

1254(1)A listing of all parties-respondent not shown on caption of case on this petition is as follows: Dekalb County Department of Pensions & Security, and Larry DuPree, Director, and Bernice Parker, Former Director.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment VII

In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Constitution of the United States, Amendment V

No person shall...be deprived of life, liberty, or property, without due process of law...

Federal Rules of Civil Procedure, Rule 59

New Trials:Amendments of Judgements

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues(1) in any action in which there has been a trial by jury, for

any of the reasons for which new trials have heretofore been granted in action at law in courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgement if one has been entered, take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgement.

RELIEF UNDER SUBDIVISION (b)

Federal Rules of Civil Procedure, Rule 60(b)

As is recognized in many cases, a motion for relief from a judgement under Rule 60(b) is addressed to the discretion of the court, although there are some situations so extreme that the result is

foreordained and it would be an abuse of discretion to either grant relief or deny relief.

Federal Rules of Civil Procedure. Rule 60(b)(6)

(6) ..the leading cases speaking of a requirement of exceptional or extraordinary circumstance...

STATEMENT OF THE CASE

Prior to September 12, 1982, plaintiff was employed by defendant at the State of Alabama Dekalb County Department of Pensions and Security(Human Services, Dekalb DPS, et al.) as a social worker. Plaintiff was employed in 1969 and six months later underwent extensive electroshock therapy and subsequently many years up until 1982, rehabilitation and job accommodation and restructuring at Dekalb DPS, Fort Payne, Alabama. Prior to plaintiff's discharge, his

director, defendant, Mrs. Bernice Parker persistently demanded that plaintiff retire on his disability. Ten months prior to plaintiff's discharge, plaintiff was admitted by Dr. Allie Boyd to Druid City Hospital, Tuscaloosa, Alabama, for extensive neurological testing due to the seriousness of plaintiff's disability. After plaintiff was discharged ostensibly for failure to or inability to do the work, (EVENTHOUGH PLAINTIFF HAD FILED WITH EEOC a job discrimination complaint four months prior to discharge from job). Plaintiff was financially unable to hire counsel to file discrimination suit. Accordingly, plaintiff filed suit pro-se in the United States District Court for the Northern District of Alabama in

Ausust 1984, just prior to the two year statute of limitations. And after this, Attorneys Charles McGee and Steve Bussman, Fort Payne, Alabama, asserted that they would take over my job discrimination suit for me and handle it along with my complaint to The Office For Civil Rights in Atlanta and Washington D. C. and also continue to handle plaintiff's two zoning and rent cases. Attorneys McGee and Bussman were partners with Attorney Hawkins, a retired Dekalb County Judge. Retired Judge Hawkins is a very close acquaintance with defendant's former director, Mrs. Bernice Parker due to the very involved case load of child welfare cases that were adjudicated over the years by and with the information Mrs. Parker provided to Judge Hawkins. It seems that since former Dekalb County Circuit Judge Hawkins and former Dekalb

County Department of Pensions and Security Director, Mrs. Parker fraudulently conspired with Judge Hawkins' other law partners, McGee and Bussman to delay promised action on plaintiff's suit CV-84-AR-2210-M and without the knowledge of plaintiff nor District Judge Acker as to the reason for the delay. Judge Acker dismissed said suit on August 12, 1985, for want of prosecution. During this time plaintiff continued to be disabled by anxiety and illness and also Attorney McGee was also experiencing domestic problems which could very well have contributed to his aggravating circumstances to grossly neglect civil rights discrimination case of diligent client plaintiff.

Plaintiff has just learned from a friend how his case was also malpracticed by plaintiff's former Attorney McGee.

Information sheds new light as plaintiff alleges that former director of defendant, Mrs. Bernice Parker, was also plaintiff's director for about 12 years, and former Dekalb County Circuit Judge Hawkins, for many years worked in liasson with defendant's director on the ajudication of many child-welfare and other cases connected with the DEFENDANT, DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, et al. Throughout these years there was a well-established rapport between Director Parker and Judge Hawkins in advisorial capacities for perspectives on welfare-related cases. Former Dekalb County Circuit Judge Hawkins was a law partner with plaintiff's attorney, Attorney Charles McGee in 1985 when case herein was fraudulently mishandled by

Attorney McGee, by the fact that Attorney McGee was very dilatory in taking the actions as initially promised on the case herein prior to its dismissal in 1985, and subsequently did not appeal herein case as he had promised plaintiff, however Attorney McGee did make an amended complaint to herein case while plaintiff was in his office one day and plaintiff heard this being made while at Attorney McGee's desk, however when plaintiff was supposed to deliver it to District Court after lunch, Attorney McGee called and discovered case had been dismissed a few days earlier, to which Attorney McGee re-assured plaintiff that he would be sure and appeal the dismissal before the time allowed. During the time Atty McGee broke appointments with plaintiff, and finally had plaintiff in his office to work on case just prior to its dismissal. On

receipt of materials relevant to herein case from opposing counsel and the District Judge Acker, who apparently, like plaintiff, was never aware that Attorney McGee was purposely being slow and had actually received no confirmation that Attorney McGee was handling case other than that reported by plaintiff to defendant counsel. Plaintiff would read these materials and then hand deliver(The Court and defendant counsel had no knowledge of why there was delay on plaintiff's part, but plaintiff thought that such delay was normal for cases) to Attorneys McGee or Bussman or their secretarial staff. And Attorneys McGee and Bussman indicated in 1984 and 1985 that they would handle herein case along with plaintiff's application and complaint to The Office For Civil Rights in Atlanta and Washington. D.C. However, at first on

that case, Attorney McGee suggested that plaintiff just utilize his office space and address to correspond to the Washington office, and on two other cases, a delinquent rents case and a rental unit zoning case. Attorneys McGee and Bussman did handle for plaintiff also.

After dismissal of first case, plaintiff instituted second case CV-85-C-2449-M September 1985, in same court before the three year statute of limitations was up on wilful discrimination for which plaintiff's case is applicable, and on November 8, 1985, plaintiff extensively amended CV-85-C-2449-M and on 12th February, 1986, this case was dismissed due to prior adjudication on same merits. In March 1986, plaintiff appealed

earlier denials of Rule Motion 60(b) based on excusable neglect and then on December 31, 1986, both appeals of earlier denials were AFFIRMED by Fay, Anderson, and Edmondson, Circuit Judges, United States Court of Appeals For the Eleventh Circuit, and subsequently denied on January 30, 1987, on a timely filed petition for rehearing.

ARGUMENT

I.

May a plaintiff receive the Seventh Amendment right to a jury trial upon discovery of fraud of plaintiff counsel?

Plaintiff concludes that since there has been such close working relationship with plaintiff's counsel, McGee and Bussman and their partner Hawkins, who did have extensive dealings and

collaboration with defendant Parker, over many years, that there exists fraud of plaintiff counsel toward plaintiff: so that plaintiff initially filed in August 1984, CV-84-AR-2210-M, would never be heard in court due to delay of plaintiff counsel, and subsequent failure of plaintiff counsel to appeal dismissal, as promised and re-assured, to plaintiff, by Attorney McGee at the time assiduous care would be taken to keep the case from default, and after dismissal of case, Attorney McGee assured plaintiff that case No. CV-84-AR-2210-M would be timely appealed by Attorney McGee. Handicapped plaintiff worked with defendant employer and was discharged, wilfully violating civil rights discrimination rules, and thereby plaintiff's counsel McGee

conspired to by fraud to delay and failed to appeal as promised to plaintiff the subsequently dismissed case of plaintiff. Plaintiff should receive case re-instated in District Court. Mervin C. McKinney, Appellant, v. Joseph Boyle, et al., Appellee. No.22374 United States Court of Appeals. Dec. 4, 1968. The Court of Appeals. Duniway, Circuit Judge, held that plaintiff's allegations that the plaintiff's allegations that the settlement stipulations had been procured by fraud within rule relating to setting aside of dismissals and court trial improperly dismissed motion on ground that it had not been filed within one-year period otherwise provided. FRAUD on the part of a party's own counsel and his former wife, does not come under Rule 60(b)(3) and relief is available under

Rule 60(b)(6) eventhough more than a year has passed. McKinney v. Boyle, C.A.9th, 1968, 404 F.2d 632, certiorari denied 89 S.Ct. 1481, 394 U.S. 992, 22 L.Ed.2d 767.

II.

Where personal problems of counsel caused him grossly to neglect a diligent plaintiff's case and to mislead plaintiff, is handicapped plaintiff eligible to have their civil rights discrimination case reinstated?

Plaintiff was unaware that plaintiff's Attorney McGee was having many domestic problems with his marriage at the time that Attorney McGee grossly neglected plaintiff's case causing it to be DISMISSED due to neglect and delay and other reasons and plaintiff's counsel was re-assuring plaintiff that it was going

to be handled in a timely manner by plaintiff Attorney McGee. GROSS NEGLECT of plaintiff's counsel, of which plaintiff was unaware, coupled with absence of neglect on the part of plaintiffs, constituted more than "excusable neglect" referred to in Rule 60(1) and permitted relief under Rule 60(b)(6). King v. Mordowanec, D.C.R.I.1969, 46 F.R.D. 474. Preoccupation of counsel with other matters, and his failure to notify client that case was dismissed for want of prosecution, was held so extraordinary as to fall under subdivision (6), rather than subdivision (1) dealing with "excusable neglect", and thus relief was permitted after more than one year had elasped. L. P. Steuart, Inc. v. Matthews, C.A.1964, 329 F.2d 234, 117 U.S.App.D.C.,

Certiorari denied 85 S.Ct. 50, 379 U.S. 824, 13 L.Ed.2d 35, noted 1965, 67 W.Va.L. Rev. 641.

Regardless of when Rule Motion 60(b) is made, it is addressed to the discretion of the district court. In general relief is given under clause (6) in cases in which the judgement was obtained by the improper conduct of the party in whose favor it was rendered or judgement resulted from the excusable default of the party against whom it was directed under circumstance going beyond earlier clauses of the rule. These cases certainly seemed to establish clause (6) AND THE FIRST FIVE CLAUSES are mutually exclusive and that relief cannot be granted under clause (6) if it would have been available under other clauses. This reading seems required also by the rule. (WRIGHT & MILLER).

III.

Does a District Court lack jurisdiction to automatically appoint counsel for unrepresented in forma pauperis plaintiffs in job civil rights cases to provide more constitutional protection?

When action CV-84-AR-2210-M was filed by plaintiff, plaintiff was not advised at the time to also file for counsel at the time of in forma pauperis application and could not find counsel at the time.

There are civil rights job discrimination plaintiffs that are in forma pauperis that receive court appointed counsel, and counsel appointed

at time of approval of unrepresented in forma pauperis plaintiff would appear in accord.

IV.

Can a dismissal for want of prosecution be set aside because of gross and inexcusable neglect of plaintiff counsel when plaintiff was suffering from anxiety and illness?

Plaintiff counsel's gross and inexcusable neglect should be taken into consideration and plaintiff's dismissal set aside as plaintiff as in TRANSPORT POOL DIV. OF CONTAINER LEASING, INC., a California corporation, v. JOE JONES, d/b/a JOE JONES TRUCKING COMPANY and JESSIE B. BLAYTON, Civ. A. Nos. 12099, 12590. United States District Court, N. D. Georgia, Atlanta Division. 1970.

On two other cases; rent and zoning, Attorneys McGee and Bussman, were paid

two hundred dollars each and the civil rights discrimination case in District Court, Attorney McGee indicated a one-third contingency charge would be made.

It is therefore requested by plaintiff that this new and more enlightening information of counsel fraud and gross neglect of counsel be considered so the dismissal of August 12, 1985, can be set aside due to exceptional and extraordinary circumstances under Rule Motion 60(b)(6).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submittted,

FRANK J. BROWN, pro-se
P.O Box 222
Fort Payne, Alabama
35967

(205) 845- 5428

CERTIFICATE OF SERVICE

I certify that I have served three copies of the foregoing Petition for Writ of Certiorari on all parties required to have been served, by mailing same to the Honorable William F. Prendergast and the Honorable Sharon E. Ficquette, Counsel for Defendants-Appellees, STATE OF ALABAMA Department of Pensions and Security, et al., Administrative Bldg., 64 North Union Street, Montgomery, Alabama 36130, properly addressed and with sufficient first-class postage pre-paid this13thday of May 1987.

Frank J. Brown, pro-se

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7175

Non-Argument Calendar

D.C. Docket No. 85-2449

FRANK BROWN,
Plaintiff-Appellant,
versus

STATE OF ALABAMA DEPARTMENT
OF PENSIONS AND SECURITY AND
DEKALB COUNTY DEPARTMENT OF
PENSIONS AND SECURITY, AND
MR. LARRY DUPREE, DIRECTOR
AND MRS. BERNICE PARKER, FORMER DIRECTOR,
ET AL.,
Defendants-Appellees.

No. 86-7200

Non-Argument Calendar

D.C. Docket No. 84-2210

FRANK BROWN,
Plaintiff-Appellant,
versus

DEKALB COUNTY DEPARTMENT
OF PENSIONS AND SECURITY,

Defendant-Appellee.

Appeals from the United States
District Court for the Northern District
of Alabama

Before FAY, ANDERSON, and EDMONDSON,
Circuit Judges.

JUDGEMENT

These causes came to be heard on the transcipt of the record from the United States District Court for the Northern District of Alabama, and were taken under submission by the Court upon the record and briefs on file , pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgements of the said District Court

in these causes be and the same are hereby, AFFIRMED:

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 31, 1986

For the Court:Miguel J. Cortez, Clerk

By: DAVID MOLAND
Deputy Clerk

ISSUED AS MANDATE: FEB 10, 1987

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7175

FRANK BROWN,

Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF

PENSIONS AND SECURITY AND DEKALB COUNTY

DEPARTMENT OF PENSIONS AND SECURITY,
et al.,

Defendants-Appellees.

No. 86-7200

FRANK BROWN,

Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF
PENSIONS AND SECURITY,

Defendant-Appellee.

Appeal from the United States District
Court for the Northern District
of Alabama

ON PETITIONS FOR REHEARING

(JAN 30 1987)

BEFORE: FAY, ANDERSON AND EDMONDSON, Circuit Judges.

PER CURIAM:

The petitions(s) for rehearing filed by appellant, FRANK BROWN, is denied.

ENTERED FOR THE COURT:

FAY

United States Circuit Judge

FILED JAN 30, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

FRANK BROWN,

PLAINTIFF)

VS.)

) CIVIL ACTION NO.

) 84-AR-2210-M

DEKALB COUNTY DEPARTMENT)
PENSIONS &)
SECURITY,)
DEFENDANT

ORDER OF DISMISSAL

This case is in the following posture.

It is set for trial on September 9, 1985.

Plaintiff, Frank Brown, who is pro se, failed to present a proposed pre-trial order at the pre-trial conference held on July 1, 1985. At that conference the court clearly explained to plaintiff that a form to be used for preparing a pre-trial order had been mailed to him

with the order setting the pretrial conference, and that a plaintiff is required to present the initial draft of a pre-trial order and submit it first to the defendant and then to the court. The court then re-scheduled the pre-trial conference for August 9, 1985.

On July 1, 1985, plaintiff was also informed by defendant (and the court concurred) that there is no legal entity entitled "DeKalb County Department of Pensions & Security", and that plaintiff's complaint should be amended properly to name the defendant.

As has been made apparent to plaintiff from the ruling on defendant's earlier motion for a summary judgement, a crucial factual issue is the date upon which plaintiff actually received his

right-to-sue letter in light of the fact that the EEOC destroyed its records of the transaction. Defendant has given notice to plaintiff on several occasions to depose plaintiff, but plaintiff has failed and refused to appear for deposition.

On August 9, 1985, plaintiff failed to appear for the re-scheduled pre-trial conference and has not communicated in any way with the court or with defendant's counsel.

The court has leaned over backards to accommodate to plaintiff's pro se status and has given plaintiff every opportunity to prosecute his action. Perhaps for cause plaintiff has chosen to abandon his action, and there is no viable alternative under the circumstances except dismissal.

For good cause shown, of the court's own motion, the action is DISMISSED for want of prosecution.

Costs are taxed against plaintiff.

DONE this 12th day of August, 1985.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

FRANK BROWN,

Plaintiff,

vs.

) CIVIL ACTION
) NUMBER
) 85-C-2449-M

STATE OF ALABAMA DEPARTMENT
OF PENSIONS AND SECURITY,)
et al.,)
Defendants.)

ORDER OF DISMISSAL

This cause came to be heard upon defendant's motion to dismiss the above styled action on the ground that it is barred by a prior adjudication on the merits with respect to the same cause of action.

On August 27, 1986, the plaintiff filed an action in this court styled Frank J. Brown v. Dekalb County Department of Pensions and Security, CV

84-AR-2210-M. In an order entered on August 12,1985, United States District Judge William M. Acker, Jr., dismissed the action for lack of prosecution. Pursuant to Fed.R.Civ.P. 41(b), said order of dismissal constitutes an adjudication on the merits which bars further adjudication on the same cause of action. See Bierman v. Tampa Electric Co., 604 F.2d 929 (5th Cir. 1979).

There is no question that the present action involves the same cause of action as the dismissed case since the plaintiff literally filed the same complaint in both actions. The plaintiff simply crossed out the docket number from the first case and then refiled the complaint.

Accordingly, the case must be dismissed. It is therefore ORDERED, ADJUDGED and DECREED that the above styled case is dismissed with prejudice, and that the plaintiff shall bear the costs of this action.

DONE this 12th day of February, 1986.

U. W. Clemon
UNITED STATES DISTRICT JUDGE

No. 86-1834

Supreme Court, U.S.
FILED
JUL 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK J. BROWN,
Petitioner,

v.

ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SHARON E. FICQUETTE*
WILLIAM PRENDERGAST
Assistant Attorneys General

STATE OF ALABAMA
DEPARTMENT OF HUMAN RESOURCES
Fifth Floor, Administrative Bldg.
64 N. Union Street
Montgomery, AL 36130-1801
205/261-5622
Attorneys for Respondents

*Counsel of Record

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. HAS PETITIONER PRESENTED ANY REASON UNDER RULE 17 TO JUSTIFY THIS COURT GRANTING CERTIORARI?

2. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DISMISSING PETITIONER'S CASES?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
i. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW.	2
ii. STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	7
ARGUMENT	7
I. PETITIONER HAS NOT PRESENTED ANY REASONS UNDER SUPREME COURT RULE 17 TO JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	7
II. CONTENTIONS NOT RAISED IN THE COURT OF APPEALS AND NOT ADDRESSED BY THAT COURT ARE NOT TO BE CONSIDERED BY THIS COURT	10
III. THE QUESTION FOR REVIEW BEFORE THIS COURT IS TO DETERMINE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING MR. BROWN'S ORIGINAL SUIT	11

IV. THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY FILED 11

CONCLUSION 12

PROOF OF MAILING AFFIDAVIT 13

PROOF OF SERVICE 15

APPENDIX:

APPENDIX A—OPINION OF COURT OF APPEALS 1a

APPENDIX B—JUDGMENT OF COURT OF APPEALS 4a

APPENDIX C—ORDER OF COURT OF APPEALS 6a

APPENDIX D—ORDER OF DISTRICT COURT 8a

APPENDIX E—ORDER OF DISTRICT COURT 10a

APPENDIX F—ORDER OF DISTRICT COURT 12a

APPENDIX G—ORDER OF DISTRICT COURT 13a

APPENDIX H-ORDER OF APPEALS COURT 14a

TABLE OF AUTHORITIES

Case	**Page**
E.E.O.C. v. Federal Labor Relations Authority, 106 S.Ct. 1678, 90 L.Ed.2d 19	10
FTC v. Grolier, Inc., 462 U.S. 19, 23, 106 S.Ct. 2209, 2212, 76 L.Ed. 2d 387 (1983)	10
Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S.Ct. 156 27 L.Ed.2d 174 (1970)	9
Maine v. Taylor, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)	9
National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S.Ct. 2778, 49 L.ED.2d 747, *rehearsing denied*, 429 U.S. 874, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976)	11
Perry Education Assn. v. Perry Local Educator's Assn., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)	9
Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012, *rehearsing denied*, 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982)	10
Silkwood v. Kerr-McGee Corp., 462 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)	9
Tennessee v. Dunlap, 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d 660 (1976)	10
Constitution and Statutes	
28 U.S.C. §1254	2, 9
28 U.S.C. §2101(c)	11
Other Authorities	
Rule 56, F.R.Civ.P	2

Rule 60(b) F.R.Civ.P 3, 10

Rule 17 of the Rules of the Supreme Court 7, 8

Rule 33 of the Rules of the Supreme Court 12

Rule 21 of the Rules of the Supreme Court 12

Rule 46 of the Rules of the Supreme Court 12

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

FRANK J. BROWN,
Petitioner,

v.

ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of the district court is unpublished. The opinion and judgment were rendered on December 31, 1986. The opinion and judgment of the Court of Appeals are attached hereto as Appendices A and B, respectively.

The petition for rehearing in the Court of Appeals filed by Mr. Brown was denied by the Eleventh Circuit Court of Appeals on January 30, 1987. A copy of the judgment is attached as Appendix C.

The opinions and judgments of the district court are attached hereto as Appendices D and E, respectively. The orders of the district court denying Mr. Brown leave to appeal *in forma pauperis* are attached hereto as

Appendices F and G, respectively. The order of the Eleventh Circuit Court of Appeals denying Mr. Brown's motion to appeal *in forma pauperis* is found at Appendix H.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1987 (see Appendix E). The petition for rehearing was denied on January 30, 1987 (see Appendix C). This Petition for a Writ of Certiorari was not filed within ninety days after that date. This Court's jurisdiction therefore has not been properly invoked under 28 U.S.C. §1254(c).

STATEMENT OF THE CASE

i. Course of Proceedings and Dispositions in the Court Below

This action was commenced by Petitioner, Frank Brown, filing his complaint on August 27, 1984 against the Respondent Dekalb County Department of Pensions and Security in the United States District Court for the Northern District of Alabama, Middle Division. Said Respondent filed a Motion to Dismiss and said motion was construed by the court as a motion for summary judgment pursuant to Rule 56, F.R.Civ.P. On April 11, 1985, Judge William M. Acker, Jr., issued an *ORDER* overruling the Department's summary judgment motion and stating further that the ruling was without prejudice to the Department's filing another Rule 56 motion if and when it could provide undisputed verification of the date upon which Brown received his right-to-sue letter and if the date was more than ninety days prior to August 27, 1984.

The Department filed an Answer with Affirmative Defense on May 1, 1985. Judge Acker issued an *ORDER*

on July 3, 1985, stating that the pre-trial conference scheduled for July 1, 1985 was not held because Petitioner Brown failed to present or bring a proposed pre-trial order to the pre-trial conference scheduled on July 1, 1985. The court rescheduled the pre-trial conference to August 9, 1985.

The Department issued a Notice of Taking Deposition to the *pro se* Plaintiff on July 3, 1985. The Department filed a motion for summary judgment, amended answer and motion to dismiss or in the alternative for sanction; and, memorandum brief requested by the court on August 2, 1985. Judge Acker issued an order on August 5, 1985 stating that the Department's motion would be taken under submission by the court, without oral argument.

On August 12, 1985, Judge Acker entered an *ORDER OF DISMISSAL.* Petitioner filed a Rule 60(b) motion on March 11, 1986 which was denied by Judge Acker on March 13, 1986. Petitioner filed a Notice of Appeal of his Rule 60(b) motion on March 17, 1986.

In the second case that is the subject of this appeal and which has been consolidated with the original case, Petitoner filed his complaint on September 13, 1985, one month after the first complaint was dismissed. This complaint was against the State of Alabama Department of Pensions and Security, DeKalb County Department of Pensions and Security, Larry Dupree, Director DeKalb County Department of Pensions and Security, Bernice Parker, former Director Dekalb County Department of Pensions and Security, et. al. Mr. Brown filed an Amended Complaint on November 5, 1985. On February 12, 1986, Judge U. W. Clemon issued an *ORDER OF DISMISSAL,* dismissing Petitioner's action on the ground that it was barred by a prior adjudication on the merits which bars further adjudication on the same cause of action. Mr. Brown filed a Notice of Appeal to the

Eleventh Circuit on March 11, 1986. On March 19, 1986, Judge U. W. Clemon issued an *ORDER* denying Petitioner's motion to prosecute an appeal *in forma pauperis.* A copy of this order is found at Appendix F. On March 24, 1986 United States District Judge, William M. Acker, Jr., denied Petitioner's motion for leave to appeal *in forma pauperis.* A copy of this order is attached as Appendix G. The Eleventh Circuit denied Mr. Brown's motion to appeal *in forma pauperis.* A copy of that order is attached as Appendix H.

The Eleventh Circuit Court of Appeals affirmed the lower Court's ruling in an unpublished decision on December 31, 1986. A copy of this decision is attached as Appendix A. The petition for rehearing was denied by the Court of Appeals on January 30, 1987. A copy of this order is attached as Appendix C.

ii. Statement of the Facts

Plaintiff was employed by the Dekalb County Department of Pensions and Security (hereinafter DCDPS)[1] on February 24, 1969 as a Social Worker. On September 13, 1982, Mr. Brown was terminated because of his failure to perform his duties as an adult service worker in the Dekalb County Adult Service Program. On August 25, 1982, Mr. Brown filed a civil rights complaint against the DCDPS alleging discrimination on the basis of handicap. The Office for Civil Rights determined that Mr. Brown did not meet the definition of a "qualified handicapped person" and was, therefore, not entitled to protection under Section 504 of the Rehabilitation Act of 1973. This decision was made in September, 1984.

[1]The Department is now known as the Department of Human Resources. The name was changed by the Alabama Legislature on April 29, 1986, Act No. 86-432.

Mr. Brown also filed a charge of sex discrimination against the DCDPS with the Equal Employment Opportunity Commission in May, 1982. In July 1983, the Petitioner filed a charge of retaliation and age discrimination with the Equal Employment Opportunity Commission (EEOC). A right-to-sue letter was issued in January 1983 stating:

> You failed to provide requested necessary information, failed or refused to appear to be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than thirty days in which to respond to our final written request.

Mr. Brown filed his complaint in the United States District Court for the Northern District of Alabama, Middle Division, on August 27, 1984. Mr. Brown alleged he was fired in retaliation for filing charges of sex and age discrimination with the EEOC. The District Court dismissed Mr. Brown's complaint for failing to present a proposed pre-trial order at the first pre-trial conference; for failing to appear at the rescheduled pre-trial conference; and for refusing to appear for depositions scheduled by the Department.

The District Court stated:

> On August 9, 1985, Plaintiff failed to appear for the rescheduled pre-trial conference and has not communicated in any way with the court or with defendants' counsel.
>
> The court has leaned over backwards to accommodate plaintiff's *pro se* status and has given plaintiff every opportunity to prosecute

> his action. Perhaps for good cause plaintiff has chosen to abandon his action, and there is no viable alternative under the circumstances except dismissal.

The Order of Dismissal was entered on August 12, 1985.

On September 13, 1985, Mr. Brown filed a complaint that was simply the same complaint as that of the previous action. The complaint had the civil action number CV-84-AR-2210-M marked out in pen. The same Defendants were named. Mr. Brown filed an amended complaint on November 5, 1985, which did not state any new allegations. Mr. Brown again alleged his termination was retaliatory for his having filed sex and age discrimination charges.

The District Court dismissed the cause on the grounds that the order of dismissal in *Frank J. Brown v. Dekalb County Department of Pensions and Security*, CV-84-AR-2210-M, constituted an adjudication on the merits which barred further adjudication on the same cause of action. The District Court found:

> There is no question that the present action involves the same cause of action as the dismissed case since the plaintiff literally filed the same complaint in both actions. The plaintiff simply crossed out the docket number from the first case and then re-filed the complaint.

The Eleventh Circuit Court of Appeals affirmed the lower Court's dismissal of the cases and stated:

> Dealing first with the appeal from the denial of the Rule 60(b) motion, we note that such are directed to the sound discretion of the district court. *Griffin v. Swim-Tech Corp.*,

722 F.2d 677, 680 (11th Cir. 1984). Although dismissal for failure to obey court ordered discovery is a sanction of last resort, a district court does not abuse its discretion in denying such a motion when the underlying dismissal has been for failure to comply with court ordered discovery, compliance was not beyond the party's control, and non-compliance demonstrated a lack of good faith. *Phillips v. Insurance Co. of North America*, 633 F.2d 1165, 1167 (5th Cir. 1981). We find just such a situation here. Although proceeding *pro se*, Brown clearly had the ability to comply with the Court's orders. There was no abuse of discretion.

The filing of the second lawsuit and the use of what appears to be a photocopy of the first complaint is clearly improper. The dismissal of the first suit, which was never the subject of a direct appeal, operates as an adjudication on the merits. The final judgment entered in that matter bars further claims based upon the same cause of action. *Brown v. Felson*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). The dismissal of the second suit on grounds of *res judicata* was proper.

SUMMARY OF ARGUMENT

Petitioner has not presented any reasons under Rule 17 to justify the granting of the Writ. Petitioner has presented new contentions not raised in the District Court or the Court of Appeals. These contentions should not be considered by this Court on certiorari.

ARGUMENT

I. PETITIONER HAS NOT PRESENTED ANY REASONS UNDER SUPREME COURT

RULE 17 TO JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Supreme Court Rule 17.1 provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling, nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of

> federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner has written a broad and vague petition which fails to fully address any of the reasons for granting a Writ of Certiorari outlined in the above Rule.

In this case there is no state statute that has been struck down by a Federal Court of Appeals. 28 U.S.C. §1254 provides that, "this Court is empowered to review the decision of a Federal Court of Appeals by appeal if a State Statute is held by the Court of Appeals to be invalid as repugnant to the Constitution." This Court has consistently stated that statutes authorizing appeals are to be strictly construed. *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 43, 103 S.Ct. 948, 953, 74 L.Ed.2d 794 (1983); *Fornaris v. Ridge Tool Company*, 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970); *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984). This case does not come within the scope of jurisdictional grant of 28 U.S.C. §1254. The decision below, accordingly, is not reviewable by a writ of certiorari. Statutes authorizing appeals as of right to the Supreme Court are strictly construed. *Maine v. Taylor*, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

Petitioner has filed a petition which does not address any of the issues required for granting certiorari. In fact, Mr. Brown's Petition for certiorari fails to address any of the jurisdictional requirements for reasons for granting review by this Court. Mr. Brown presents this Court with a petition containing vague and inconclusive statements addressing a wide range of complaints. These allegations were adequately addressed in review by the District Court and Court of Appeals below.

II. CONTENTIONS NOT RAISED IN THE COURT OF APPEALS AND NOT ADDRESSED BY THAT COURT ARE NOT TO BE CONSIDERED BY THIS COURT.

Claims not included in the complaint and not considered by the District Court or the Court of Appeals are not before the Supreme Court on certiorari. *Tennessee v. Dunlap*, 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d. 660 (1976). Contentions that are not raised in the Court of Appeals and not addressed by that Court are not considered by this Court. *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d. 1012, *rehearing denied*, 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d. 160 (1982). The issues presented for review by the Eleventh Circuit Court of Appeals are whether or not the District Court erred in denying Mr. Brown's Rule 60(b) motion and whether the District Court errred in denying Mr. Brown's Rule 60(b) motion without a hearing. Those issues were stated by Mr. Brown in his Brief to the Eleventh Circuit Court. In his Petition for a Writ of Certiorari, Mr. Brown presents five (5) new and novel issues that have never been presented in the District Court or to the Eleventh Circuit Court of Appeals. However, Mr. Brown had an ample and adequate opportunity to present these issues to both of those forums. The issues that Mr. Brown presents are neither on point and pertinent, nor are they relevant to this case.

This Court has declared that it will not address issues that have not been raised in the Court of Appeals. *E.E.O.C. v. Federal Labor Relations Authority*, 106 S.Ct. 1678, 90 L.Ed.2d 19; *see, e.g., F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 23, 106 S.Ct. 2209, 2212, 76 L.Ed. 2d 387 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012 (1982). Mr. Brown originally filed suit based upon alleged discriminatory employment practices. The original complaint was filed in the District Court on August 27, 1984. On August 12, 1985, that suit

was dismissed because Mr. Brown failed to comply with Court ordered pretrial procedures. Months later, after a Rule 60(b) motion was denied, Mr. Brown filed an identical copy of his original complaint as a new action. This action was dismissed as *res judicata.* The dismissal of the first suit, which was never the subject of a direct appeal, operates as an adjudication on the merits. Mr. Brown had an opportunity in both cases below to pursue any legitimate claims that he may have had.

III. THE QUESTION FOR REVIEW BEFORE THIS COURT IS TO DETERMINE WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING MR. BROWN'S ORIGINAL SUIT.

This court has consistently held that petitions for certiorari are to be viewed in the light of abuse of discretion by the District Court. *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747, *rehearing denied,* 429 U.S. 874, 97 S.Ct. 197, 50 L.Ed.2d. 158 (1976).

IV. THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY FILED.

Mr. Brown's Petition for Writ of Certiorari was not filed within the ninety day time period required after entry of judgment or decree. 28 U.S.C. §2101(c) requires that a writ of certiorari must be applied for within ninety days after the entry of judgment or decree. The judgment was entered by the Eleventh Circuit Court of Appeals on December 31, 1986. The Petition for rehearing was denied by the Eleventh Circuit Court of Appeals on January 30, 1987. The Petition was not properly filed according to the rules of this Court.

Petitioner failed to timely file a corrected copy of his petition within ninety days after the date of denial of rehearing by the Court of Appeals. The Petition for Writ

of Certiorari fails to comply with Rule 33 of the Supreme Court Rules. The Petition has not been produced on paper that is 6⅛ by 9¼ inches in size. The Petition also fails to comply with Rule 21 of the Supreme Court Rules in that the Petition does not contain the proper documents. Petitioner has not paid the required docket fee. Petitioner failed to present a motion for leave to appeal *in forma pauperis* pursuant to Rule 46 of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

SHARON E. FICQUETTE*
WILLIAM PRENDERGAST
Assistant Attorneys General
State of Alabama Department
of Human Resources
Fifth Floor, Administrative Bldg.
64 North Union Street
Montgomery, AL 36130-1801
(205) 261-5622

COUNSEL FOR RESPONDENTS

*Counsel of Record

No. 86-1834

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FRANK J. BROWN,

Petitioner,

v.

ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, *et al.*,

Respondents.

PROOF OF MAILING AFFIDAVIT

I, Sharon E. Ficquette, Attorney of Record for the Alabama Department of Human Resources, Respondents herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of July, 1987, I deposited in a United States mailbox located at 100 Commerce Street, Montgomery, Alabama, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Sharon E. Ficquette

Sharon E. Ficquette

SWORN TO AND SUBSCRIBED before me, at

Montgomery, Alabama, this the 15th day of July, 1987.

Sheila E. Berry

NOTARY PUBLIC

MY COMMISSION EXPIRES:

4/18/90

No. 86-1834

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FRANK J. BROWN,

Petitioner,

v.

ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, *et al.*,

Respondents.

PROOF OF SERVICE

I, Sharon E. Ficquette, Attorney of Record for the Alabama Department of Human Resources, Respondents herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of July, 1987, I served a copy of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on all parties required to be served as follows: on Petitioner herein, by depositing a copy in the United States mail, with first-class postage prepaid, addressed to:

To Mr. Frank J. Brown
P.O. Box 222
Fort Payne, Alabama 35967

Sharon E. Ficquette

Sharon E. Ficquette
Attorney for Respondents
State of Alabama Department
of Pensions and Security, et al.

State Dept. of Human Resources
5th Floor, Administrative Bldg.
64 North Union Street
Montgomery, AL 36130-1801
(205) 261-5622

No. 86-1834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK J. BROWN,
Petitioner,

v.

ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

APPENDIX

SHARON E. FICQUETTE*
WILLIAM PRENDERGAST
Assistant Attorneys General

STATE OF ALABAMA
DEPARTMENT OF HUMAN RESOURCES
Fifth Floor, Administrative Bldg.
64 N. Union Street
Montgomery, AL 36130-1801
205/261-5622
Attorneys for Respondents

*Counsel of Record

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175
Non-Argument Calendar*

FRANK BROWN,
Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, AND MR. LARRY DUPREE, DIRECTOR, AND MRS. BERNICE PARKER, FORMER DIRECTOR, et al.,
Defendants-Appellees.

No. 86-7200
Non-Argument Calendar*

FRANK BROWN,
Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant-Appellee.

---

*Fed. R. App. P. 34(a); 11th Cir. R. 23.

Appeals from the United States District Court
for the Northern District of Alabama

(December 31, 1986)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Brown filed suit based upon alleged discriminatory employment practices. The original complaint was filed on August 27, 1984. On August 12, 1985 that suit was dismissed because Brown had failed to file his pre-trial papers, failed to appear for his deposition and failed to comply with other court ordered pre-trial procedures. Months later, on March 11, 1986, Brown filed a Rule 60(b) motion seeking relief from the dismissal. This request was denied and that ruling gives rise to the first appeal.

Subsequently, Brown filed an identical copy of his original complaint as a new action. This was done on September 13, 1985. Following the filing of a motion to dismiss, this action was dismissed as *res judicata*. This ruling is the basis of the second apeal.

Dealing first with the appeal from the denial of the Rule 60(b) motion, we note that such are directed to the sound discretion of the district court. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). Although dismissal for failure to obey court ordered discovery is a sanction of last resort, a district court does not abuse its discretion in denying such a motion when the underlying dismissal has been for failure to comply with court ordered discovery, compliance was not beyond the party's control, and noncompliance demonstrated a lack of good faith. *Phillips*

v. Insurance Co. of North America, 633 F.2d 1165, 1167 (5th Cir. 1981).[1] We find just such a situation here. Although proceeding *pro se*, Brown clearly had the ability to comply with the court's orders. There was not abuse of discretion.

The filing of the second lawsuit and the use of what appears to be a photocopy of the first complaint is clearly improper. The dismissal of the first suit, which was never the subject of a direct appeal, operates as an adjudication on the merits. The final judgment entered in that matter bars further claims based upon the same cause of action. *Brown v. Felson*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). The dismissal of the second suit on grounds of *res judicata* was proper.

AFFIRMED.

---

[1]The Eleventh Circuit, in *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175
Non-Argument Calendar

D.C. Docket No. 85-2449

FRANK BROWN,
Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, AND MR. LARRY DUPREE, DIRECTOR, AND MRS. BERNICE PARKER, FORMER DIRECTOR, et al.,
Defendants-Appellees.

No. 86-7200
Non-Argument Calendar

D.C. Docket No. 84-2210

FRANK BROWN,
Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Alabama

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and were taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 31, 1986

For the Court: Miguel J. Cortgez, Clerk

By: /s/David Malaud
Deputy Clerk

ISSUED AS MANDATE: Feb. 10, 1987

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175

FRANK BROWN,
Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, et al.,
Defendants-Appellees.

No. 86-7200

FRANK BROWN,
Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed January 30, 1987)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

ON PETITION(S) FOR REHEARING

(January 30, 1987)

BEFORE: FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, FRANK BROWN, is *denied.*

ENTERED FOR THE COURT:

/s/Peter T. Fay
United States Circuit Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

Civil Action No. 86-AR-2210-M

FRANK BROWN,
Plaintiff,

VS.

DEKALB COUNTY DEPARTMENT OF PENSIONS & SECURITY,
Defendant.

(Filed August 12, 1985)

ORDER OF DISMISSAL

This case is in the following posture.

It is set for trial on September 9, 1985.

Plaintiff, Frank Brown, who is *pro se*, failed to present a proposed pre-trial order at the pre-trial conference held on July 1, 1985. At that conference the court clearly explained to plaintiff that a form to be used for preparing a pre-trial order had been mailed to him with the order setting the pre-trial conference, and that a plaintiff is required to present the initial draft of a pre-trial order and to submit it first to the defendant and then to the court. The court then rescheduled the pre-trial conference for August 9, 1985.

On July 1, 1985, plaintiff was also informed by defendant (and the court concurred) that there is no legal entity entitled "DeKalb County Department of Pensions & Security", and that plaintiff's complaint

should be amended properly to name the defendant.

As was made apparent to plaintiff from the ruling on defendant's earlier motion for summary judgment, a crucial factual issue is the date upon which plaintiff actually received his right-to-sue letter in light of the fact that the EEOC destroyed its records of the transaction. Defendant has given notice to plaintiff on several occasions to depose plaintiff, but plaintiff has failed and refused to appear for deposition. Defendant has refiled a motion for summary judgment and has filed a motion to dismiss because of plaintiff's failure to appear for deposition.

On August 9, 1985, plaintiff failed to appear for the re-scheduled pre-trial conference and has not communicated in any way with the court or with defendant's counsel.

The court has leaned over backwards to accomodate(sic) to plaintiff's *pro se* status and has given plaintiff every opportunity to prosecute his action. Perhaps for good cause plaintiff has chosen to abandon his action, and there is no viable alternative under the circumstances except dismissal.

For good cause shown, of the court's own motion, the action is DISMISSED for want of prosecution.

Costs are taxed against plaintiff.

DONE this 12th day of August, 1985.

/s/William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION NUMBER
85-C-2449-M

FRANK BROWN,
Plaintiff,

VS.

STATE OF ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, et al.,
Defendants.

(Filed Feb. 12, 1986)

ORDER OF DISMISSAL

This cause came to be heard upon defendant's motion to dismiss the above styled action on the ground that it is barred by a prior adjudication on the merits with respect to the same cause of action.

On August 27, 1986, the plaintiff filed an action in this court styled *Frank J. Brown v. Deklab County Department of Pensions and Security*, CV 84-AR-2210-M. In an order entered on August 12, 1985, United States District Judge William M. Acker, Jr., dismissed the action for lack of prosecution. Pursuant to Fed.R.Civ.P. 41(b), said order of dismissal constitutes an adjudication on the merits which bars further adjudication on the same cause of action. See *Bierman v. Tampa Electric Co.*, 604 F.2d 929 (5th Cir. 1979).

There is no question that the present action involves the

same cause of action as the dismissed case since the plaintiff literally filed the same complaint in both actions. The plaintiff simply crossed out the docket number from the first case and then refiled the complaint.

Accordingly, the case must be dismissed. It is therefore ORDERED, ADJUDGED and DECREED that the above styled case is DISMISSED with prejudice, and that the plaintiff shall bear the costs of this action.

DONE this 12th day of February, 1986.

/s/U.W. Clemon
UNITED STATES DISTRICT JUDGE
U.W. Clemon

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION NUMBER

85-C-2449-M

FRANK BROWN,

Plaintiff,

VS.

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY, et al.,

Defendants.

(Filed Mar. 19, 1986)

ORDER

Upon consideration of the plaintiff's motion to prosecute an appeal *in forma pauperis*, the Court finds that said appeal is frivolous and not taken in good faith. Accordingly, it is

ORDERED that plaintiff's motion is DENIED, and the Court certifies, pursuant to 28 U.S.C. § 1915(a), that said appeal is not taken in good faith.

DONE this 19th day of March, 1986.

/s/U.W. Clemon
UNITED STATES DISTRICT JUDGE
U.W. Clemon

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

CIVIL ACTION NO. 84-AR-2210-M

FRANK BROWN,
Plaintiff,

VS.

DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY,
Defendant.

(Filed March 24, 1986)

ORDER

The Clerk has brought to the attention of the court a purported notice of appeal filed by Frank J. Brown on March 17, 1986. The said purported notice of appeal was unaccompanied by the appropriate filing fee and unaccompanied by a motion for leave to appeal *in forma pauperis*. Nevertheless, the court will deem plaintiff, who appears *pro se*, as having filed a petition for leave to appeal *in forma pauperis*. Because the purported appeal is frivolous and without colorable merit, the court DENIES plaintiff the right to appeal *in forma pauperis*.

DONE this 21st day of March, 1986.

/s/William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7175

CV-85-C2449-M

FRANK BROWN,
Plaintiff-Appellant,

verus

STATE OF ALABAMA DEPARTMENT OF PENSIONS AND SECURITY AND DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, AND MR. LARRY DUPREE, DIRECTOR, AND MRS. BERNICE PARKER, FORMER DIRECTOR, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

---

(Filed June 4, 1986, 11th Cir.)
(Filed June 6, 1986, U.S. District Court)

ORDER:

IT IS ORDERED that appellant's motion to appeal *in forma pauperis* is DENIED. There has been no attempt to show qualification for IFP status.

IT IS FURTHER ORDERED that appellant's motion for consolidation of No. 86-7175 and No. 86-7200 is GRANTED.

/s/PETER T. FAY
UNITED STATES CIRCUIT JUDGE